

May 4, 2004

D.T.E. 04-32

Petition of Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, Yarmouth, and the Counties of Barnstable and Dukes, acting together as the Cape Light Compact, for approval pursuant to G.L. c. 164, § 134, to enter into a competitive electric supply agreement as an opt-out municipal aggregator.

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FOR: THE CAPE LIGHT COMPACT
Petitioners

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I. INTRODUCTION

On March 3, 2004, the Cape Light Compact (“Compact”)¹ filed for approval by the Department of Telecommunications and Energy (“Department”), pursuant to G.L. c. 164, § 134, a proposed municipal aggregation plan (“2004 Aggregation Plan” or “Plan”) that would make competitive electric power supply available to the approximately 195,000 customers located within its 21 member municipalities (“Filing”). The Compact states that the 2004 Aggregation Plan is based largely on (1) the municipal aggregation plan (“2000 Plan”) approved by the Department in Cape Light Compact, D.T.E. 00-47 (2000), and (2) the default service pilot program (“Pilot Program”) approved by the Department in Cape Light Compact, D.T.E. 01-63 (2001) (Filing at ¶ 18).

The Filing includes unexecuted electric supply agreements (“ESAs”) that the Compact has negotiated with three potential suppliers for the Plan (Filing at Exhs. B, C, D). The ESAs do not include any price terms. The Compact requests that the Department approve the non-price terms included in the ESAs, conditioned upon a covenant by the Compact that it will not execute an agreement with a supplier unless the supplier’s price is lower than the standard offer service rate in Commonwealth Electric Company’s (“Commonwealth”) service territory

¹ The Compact was formed in 1997 through an intergovernmental agreement of 21 towns and two counties for the purpose of establishing competitive power supply, energy efficiency, and consumer advocacy. The Compact consists of the Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, Yarmouth, and the Counties of Barnstable and Dukes.

through February 28, 2005, the remainder of the standard offer transition period (Filing at ¶ 23).²

The Department docketed the matter as D.T.E. 04-32. On March 12, 2004, the Department issued a notice of filing and request for comments. On April 1, 2004, comments were submitted by the Commonwealth of Massachusetts of Division of Energy Resources (“DOER”) and Commonwealth. The evidentiary record consists of the Compact’s responses to 21 information requests.³

II. BACKGROUND

A. Introduction

General Laws c. 164, § 134(a) authorizes any municipality or group of municipalities to aggregate the electrical load of interested electric customers within its boundaries (provided that the load is not served by a municipal lighting plant) and establishes the criteria by which the Department reviews such aggregation plans. A defining characteristic of a municipal aggregation plan is that standard offer service and default service customers are automatically enrolled in the plan unless they affirmatively opt-out of participating. See G.L. c. 164, § 134(a). The instant proceeding is the third before the Department related to the Compact’s

² The Compact’s member municipalities are located within Commonwealth’s service territory.

³ On its own motion, the Department moves the Compact’s responses to information requests DTE-1-1 through DTE-1-12, and DTE-2-1 through DTE-2-9, into the evidentiary record in this case.

municipal aggregation activities. In D.T.E. 00-47, the Department approved the 2000 Plan.

In D.T.E. 01-63, the Department approved the Compact's Pilot Program.

B. 2000 Plan

In D.T.E. 00-47, the Department approved the Compact's initial 2000 Plan (and its ESA with the supplier for the 2000 Plan), in which all standard offer service and default service customers located within the Compact's member municipalities could participate. In approving the 2000 Plan, the Department concluded that the municipal aggregation plan satisfied both the statutory requirements set forth in G.L. c. 164, § 134(a) and the regulatory requirements set forth in 220 C.M.R. § 11.00 et seq.

With respect to statutory requirements, the Department concluded that:

1. The Compact's filing included a satisfactory description of: (a) the organizational structure of the 2000 Plan, its operations, and its funding; (b) the rate setting and other costs to participating customers; (c) the methods for entering and terminating agreements with other entities; (d) the rights and responsibilities of participants; and (e) termination of the plan. D.T.E. 00-47, at 24;
2. The 2000 Plan satisfactorily provided for: (a) universal access, because participation in the plan was available to all standard offer service and default service consumers; (b) reliability, because the ESAs called for all-requirements power supply and included sufficient financial assurance provisions; and (c) equitable treatment of all classes of customers, because the plan included a reasonable phase-in of participation by customer class. Id. at 24-25;
3. The education plan, which included direct mailings to customers, and information disseminated through newspaper notices, public announcements and posting in town halls, would result in customers being satisfactorily informed of their right to opt-out of participation in the plan, as well as other pertinent aspects of the plan. Id. at 26; and
4. The prices included in the ESA were below Commonwealth's standard offer service rates. Id. at 25.

With regard to regulatory requirements, the Department:

1. concluded that the Compact's proposed method of providing participating customers with information regarding the 2000 Plan's fuel sources, emissions characteristic and labor characteristics satisfied the Department's information disclosure requirements, 220 C.M.R. § 11.06.⁴ Id. at 27-28; and
2. established the method by which existing and new customers would be enrolled in the 2000 Plan, consistent with Commonwealth's terms and conditions for competitive suppliers.⁵ Id. at 28-29.

No customers were enrolled in the 2000 Plan because the supplier availed itself of a provision in the ESA that allowed it to delay the initiation of service until such time that market conditions made it economically viable for the supplier to do so at the listed prices (Filing at ¶ 10).

C. Default Service Pilot Program

In D.T.E. 01-63, the Department approved the Compact's Pilot Program and the associated ESA, pursuant to Section 339 of Chapter 164 of the Acts of 1997.⁶ The Pilot

⁴ In approving the proposed method of providing participating customers with information regarding the 2000 Plan's fuel sources, emissions characteristic and labor characteristics, the Department granted the Compact an exception from certain provisions of 220 C.M.R. § 11.06. D.T.E. 00-47, at 27-28.

⁵ The Department's regulations at 220 C.M.R. § 11.04(9)(f) ("Distribution Company Terms and Conditions for Competitive Suppliers") require that each distribution company file, for Department approval, terms and conditions that will govern the relationship between the distribution company and competitive suppliers. These terms and conditions establish, among other things, the manner in which competitive suppliers enroll customers.

⁶ Chapter 164 of the Acts of 1997 ("Electric Restructuring Act" or "Act") directs the Department and DOER to establish a pilot program to implement the provisions of G.L. c. 164, § 134, regarding the formation of municipal aggregation plans. Electric
(continued...)

Program is based largely on the 2000 Plan approved by the Department in D.T.E. 00-47, with the exception that participation is limited to default service customers. D.T.E. 01-63, at 2.

The Pilot Program is active through December 31, 2004, with approximately 52,000 customers (who previously received default service) realizing savings of approximately \$4.7 million through their participation (Filing at ¶ 16; Cape Light Compact, D.T.E. 03-99, Compact Filing at 2, 6 (October 17, 2003)).⁷

In approving the Pilot Program, the Department stated that, if municipal aggregation activities are to continue after the termination of standard offer service, the applicable customer base will be default service customers. D.T.E. 01-63, at 5. The Department found that because the Pilot Program's focus on default service customers is representative of the focus of future post-standard offer service municipal aggregation plans, implementation of the Pilot Program was consistent with the objective of G.L. c. 164, § 134 to promote municipal aggregation. Id. at 6.

There are two provisions of the Pilot Program ESA that are particularly relevant to the Department's review in the instant proceeding: (1) the ESA stipulates that the Compact will terminate the Program if Commonwealth's default service rates were to fall below the Pilot Program price; and (2) the ESA stipulates that a participating customer could exit the Pilot

⁶ (...continued)
Restructuring Act at § 339.

⁷ The Department initially approved the Pilot Program for a 15-month period (May 1, 2002 through July 31, 2003). D.T.E. 01-63, at 7. The Department subsequently granted the Compact's requests to extend the program through December 31, 2004. Cape Light Compact, D.T.E. 03-61 (2003); D.T.E. 03-99 (2003).

Program without penalty, but such a customer could not re-enter the Pilot Program for a minimum of twelve months (D.T.E. 01-63, Compact Filing at 1 (March 15, 2002)).

III. THE COMPACT'S PROPOSAL

A. Introduction

The Compact argues that the 2004 Aggregation Plan is consistent with (1) the 2000 Plan approved by the Department in D.T.E. 00-47, and (2) the Pilot Program approved by the Department in D.T.E. 01-63 (Filing at ¶ 18). The Compact states that the following aspects of the 2004 Aggregation Plan remain unchanged from the 2000 Plan: (1) its organizational structure; (2) the operation and funding of the Plan; (3) the rate setting and other costs that will apply to participating customers; (4) the method for entering and terminating energy supply agreements with other entities; and (5) the rights and responsibilities of participating customers (Exh. DTE-1-12). The Compact states that the methods by which existing and new customers will be enrolled in the Plan, as well as the way it will comply with the Department's information disclosure requirements, also remain unchanged from the methods approved by the Department in D.T.E. 00-47 (id.).

The Compact states that, under the terms of an intergovernmental agreement (created pursuant to G.L. c. 40, § 4A), each member of its governing board, consisting of representatives from all 21 member towns, has the authority to contract on behalf of his or her town or county. Each member of the governing board has approved the ESAs included in the Filing (Exh. DTE-1-9).

B. Request for Approval of Non-Price Terms

The Compact states that it intends to select a supplier and finalize a price after receiving Department approval of the ESAs included in the Filing (Filing at ¶ 3). The Compact requests that the Department approve the non-price terms included in the ESAs, conditioned upon a covenant by the Compact that it will not execute an agreement with a supplier unless the supplier's price is lower than the standard offer service rate in Commonwealth's service territory through February 28, 2005, the remainder of the standard offer transition period (id. at ¶ 23).⁸

The Compact contends that its experience to date with supply procurement demonstrates the need to be "responsive to market changes" and the need for efficiency in executing the ESAs (id. at ¶ 21). The Compact argues that suppliers will generally provide prices only for a 24-hour period (Exh. DTE-1-1). Specifically, the Compact states that when it asked the three potential suppliers how they would react if required to hold prices for five business days (to allow for Department review),⁹ the suppliers responded that they either would not submit a bid or would place an "extremely high risk premium" on their bid prices (id.). The Compact asserts that it is, therefore, not readily practicable for suppliers to "hold" prices subject to Department approval of the price terms included in the ESAs (id.).

⁸ Commonwealth's current standard offer service rate is 6.323 cents per kilowatt-hour.

⁹ In Pricing and Procurement of Default Service, D.T.E. 99-60-C at 8-9 (2000), the Department established a five-business day period to review the results of distribution companies' default service supply solicitations.

C. Evaluation of Price Terms

The Compact states that, upon receiving Department approval of the ESAs, it will provide the three potential suppliers approximately one week to prepare their price bids, with all three suppliers being required to submit bids on the same day (Exh. DTE-1-5). The Compact will have one business day to accept or reject the bid prices (Filing at ¶ 21). The Compact states that the three potential suppliers have acknowledged in writing that the contract will not be awarded to them unless they offer a price lower than Commonwealth's standard offer service price through February 28, 2005 (id. at ¶ 22).¹⁰

The Compact states that, for the post-standard offer service period, it will evaluate bid prices against both current default service prices and projections of market prices for comparable full-requirement service as one of several "measuring tools" (Exh. DTE-1-4).¹¹ In addition to the price levels, the Compact's evaluation of bids will take into consideration (1) price stability (the Compact states that it has informed the suppliers that it seeks bid prices that remain fixed for each calendar year), and (2) term of the proposed power supply (the Compact states that it seeks to procure supply through at least September 2005, with bids for a

¹⁰ If it does not initially receive a bid price that is below the standard offer service rate, the Compact will ask the suppliers to submit new prices at a later date (Exh. DTE-1-5).

¹¹ The Compact will use the services of a technical consultant to assist in the evaluation of the suppliers' bids (Exh. DTE-1-2).

longer supply term (e.g., three years) given due consideration) (Exhs. DTE-1-2; DTE-1-8; DTE-2-3).¹²

The Compact states that, if it were required to include in the 2004 Aggregation Plan the stipulation that it will terminate the plan if Commonwealth's default service rates become less than the plan price (as was stipulated in the Pilot Program ESA), the resulting uncertainty would cause the suppliers either not to submit bids, or to submit bids that are "artificially inflated" (Exh. DTE-2-5). The Compact state that the establishment of a new "price to beat" every six months would (1) "make it unfeasible and impractical for municipal aggregators," and (2) result in consumers losing the benefits of long-term price stability (id.).

D. Commencement of Plan

The Compact states that, if it accepts a bid, it expects to begin enrolling standard offer service customers in the 2004 Aggregation Plan in late May 2004, prior to the summer peak pricing period (Exh. DTE-1-6). Customers currently participating in the Pilot Program will be enrolled in the Plan during January when the Pilot Program expires (id.).¹³ The Compact states that a participating customer may exit the Plan at any time without penalty, with the

¹² Following selection of a supplier, the Compact intends to file a letter with the Inspector General, the Department and the DOER explaining its process for selecting a winning supplier, along with a copy of the complete contract (including pricing), pursuant to G.L. c. 30B § 1(b)(33) exempting energy contracts entered into by a city, town or group of cities or towns from the competitive bid requirements of the Uniform Procurement Act (Exh. DTE-2-7).

¹³ While all default service and standard offer service customers will be automatically enrolled and begin receiving service from the Plan, customers receiving competitive supply must affirmatively choose and be accepted to participate in the Plan (Exh. DTE-1-7).

understanding that a customer that so exits may rejoin the Plan only if accepted by the supplier (Exh. DTE-2-6).

E. Electric Supply Agreements

The Compact states that it developed the current ESAs consistent with the 2000 Plan ESA and the Pilot Program ESA approved by the Department in D.T.E. 00-47 and D.T.E. 01-63, respectively (Filing at ¶ 18). The Compact contends that the ESAs in this proceeding reflect the three “most seminal components” of the ESAs approved in D.T.E. 00-47 and D.T.E. 01-63: (1) universal access to all electric consumers located in its member municipalities through an all-requirements power supply; (2) reliability through broad indemnification of the Compact and its member municipalities from third party claims (and thus protection of individual consumers), a reserve fund, and supplier-secured insurance; and (3) equitable treatment of all customers classes through automatic enrollment in the power supply program with an opt-out option (id. at ¶ 18). The Compact states that the 2004 Aggregation Plan ESAs provide for even greater reliability than the previous agreements by requiring that the suppliers provide a separate form of financial security (e.g., parent guarantees) in the event that the supplier cannot meet its obligation (id. at ¶ 24).

F. Education Plan

The Compact states that the purpose of the education plan is to raise awareness and provide consumers with information concerning the opportunities, options and rights for participation in the 2004 Aggregation Plan (id. at Exh. A). The education plan consist of two parts: (1) general education conducted through the media (via local cable television, radio

stations, newspapers, and Internet sources), electronic communications (through a toll-free customer service phone center and website), and public presentations; and (2) direct mail notification to each customer receiving standard offer service (id.). The direct mail notification will consist of: (1) a mailing by the Compact to all standard offer service customers informing them of the Plan and their right to opt-out and the ways by which customers may opt out; and (2) a notice that will appear on each customer's last standard offer service bill that informs the customer that, beginning with the next bill, the customer will be receiving competitive supply from the Plan's supplier (id.). Customers will be provided a 30-day period prior to the commencement of the Plan during which they may opt-out (id.). The education plan contains a timeline for the Plan which includes press releases, public presentations, and public awareness activities regarding opt-out opportunities (id.).

IV. SUMMARY OF COMMENTS

A. COMMONWEALTH

Commonwealth states that it does oppose the Compact's proposal, subject to certain conditions being met (Commonwealth Comments at 1-2). Specifically, Commonwealth argues that the Department should condition approval of the 2004 Aggregation Plan on the Compact providing Commonwealth with (1) 90-day notice prior to a planned termination of the Plan, (2) 90-day notice prior to the end of the anticipated term of the Plan's supply contract, and (3) two-business-day notice in the event that the supplier will not cure a contract-related material default (id.). Commonwealth contends that these conditions are necessary to minimize any customer disruption resulting from the large-scale transfer of customer load in the event

that the Plan will no longer be providing power supply to customers (id.). Commonwealth states that it has been authorized to represent that the Compact has no objection to such conditions being imposed on the Plan by the Department (id.).

B. DOER

DOER submitted comments in support of the 2004 Aggregation Plan and requests that the Department approve the Compact's filing "expeditiously so that customers can begin to receive the benefits of lower prices as soon as possible" (DOER Comments at 1). DOER argues that the Compact has "clearly demonstrated" both the organizational capability and community awareness necessary to successfully implement a municipal aggregation plan (id. at 2).

V. STANDARD OF REVIEW

The Electric Restructuring Act inserted G.L. c. 164, § 134(a), which authorizes any municipality or group of municipalities to aggregate the electrical load of interested electric customers within its boundaries, provided that the load is not served by a municipal lighting plant. Upon approval by its local governing entity, a municipality or group of municipalities may develop such an aggregation plan, in consultation with DOER, providing detailed information to consumers on the process and consequences of aggregation. General Laws c. 164, § 134(a) requires that a municipal aggregation plan provide for universal access, reliability, and equitable treatment of all classes of customers and meet any requirements established by law or the Department concerning aggregated service.

A municipal aggregation plan must include: (1) an organizational structure of the plan, its operations, and funding; (2) rate setting and other costs to its participants; (3) the method for entering and terminating agreements with other entities; (4) the rights and responsibilities of program participants; and (5) information regarding the termination of the program.

General Laws c. 164, § 134(a) provides that a municipal aggregation plan must be submitted to the Department for final review and approval. The Department is precluded from approving a municipal aggregation plan if the price of energy would initially exceed the price of standard offer service, unless the applicant can demonstrate that (1) the price will be lower than the standard offer service in subsequent years, or (2) such excess price is due to the purchase of renewable energy. G.L. c. 164, § 134(a).

Participation in a municipal aggregation plan is voluntary and a retail electric customer has the right to “opt out” of plan participation.¹⁴ Id. The statute requires municipalities to inform electric consumers of (1) automatic plan enrollment and the right to opt out, and (2) other pertinent information about the plan. Id.

The Department’s review of a plan will ensure that it meets the requirements of G.L. c. 164, § 134(a) and any other statutory requirements concerning aggregated service. In addition, the Department will determine whether a plan is consistent with the provisions in the Department’s regulations contained in 220 C.M.R. §11.00, et seq. that apply to competitive suppliers and electricity brokers. Although the Department’s regulations exempt municipal

¹⁴ A customer who opts out of the plan within 180 days of the start of service is eligible to receive standard offer service as if originally enrolled. G.L. c. 164, § 134(a).

aggregators from certain provisions,¹⁵ the regulations provide no such exemption for the competitive suppliers that are selected to serve the municipal aggregation load.

General Laws c. 164, § 134(a) specifically exempts a municipal aggregator from two requirements included in 220 C.M.R. § 11.05. First, a municipal aggregator need not be licensed as an electricity broker by the Department under the provisions of 220 C.M.R. § 11.05(2) in order to proceed with an aggregation plan. As established in G.L. c. 164, § 134(a), a municipal aggregator is allowed to proceed with its plan upon approval by its municipal governing body. Second, a municipal aggregator is not required to obtain customer authorization pursuant to G.L. c. 164, § 1F(8)(a) and 220 C.M.R. § 11.05(4). The opt-out provision applicable to municipal aggregators replaces the authorization requirements included in the Department's regulations.

¹⁵ The Department's regulations at 220 C.M.R. § 11.01 apply to "distribution companies, competitive suppliers and electricity brokers that will participate in the electric industry" in Massachusetts. The definition of electricity broker states that aggregators shall not be considered electricity brokers. 220 C.M.R. § 11.01.

A municipal aggregator is not exempt from the other rules for electric competition.¹⁶

To the extent that a municipal aggregation plan includes provisions that are not consistent with Department's rules, the Department will review these provisions on a case-by-case basis.

VI. ANALYSIS AND FINDINGS

A. Statutory Filing Requirements

General Laws c. 164, § 134(a) requires that a municipal aggregator receive approval from its municipal governing board in order to proceed with its municipal aggregation plan. G.L. c. 164, § 134(a). The Compact, pursuant to G.L. c. 40, § 4A, has formalized an intergovernmental agreement authorizing it to negotiate contracts and other agreements on behalf of its member municipalities through its governing board (Exh. DTE-1-9). The Compact states that each member of the governing board has approved the ESAs included in the Filing (*id.*). Therefore, the Department concludes that the Compact has satisfied the above statutory requirement.

In addition, G.L. c. 164, § 134(a) requires that a municipal aggregation plan filing include: (1) an organizational structure of the plan, its operations, and funding; (2) rate setting and other costs to its participants; (3) the method for entering and terminating agreements with

¹⁶ The sections of 220 C.M.R. § 11.00 that apply to competitive suppliers and electricity brokers are § 11.05 ("Competitive Supplier and Electricity Broker Requirements"), § 11.06 ("Information Disclosure Requirements"), and § 11.07 ("Complaint and Damage Claim Resolution; Penalties"). In addition, 220 C.M.R. § 11.04(9)(f) ("Distribution Company Terms and Conditions for Competitive Suppliers") requires that each distribution company file, for Department approval, terms and conditions that will govern the relationship between the distribution company and competitive suppliers. These terms and conditions establish, among other things, the process by which data is transmitted between distribution companies and suppliers.

other entities; (4) the rights and responsibilities of program participants; and (5) termination of the program. These aspects of the 2004 Aggregation Plan remain unchanged from the 2000 Plan approved by the Department in D.T.E. 00-47 (Exh. DTE-1-12). In D.T.E. 00-47, at 24, the Department concluded that the 2000 Plan satisfied the statutory requirements of G.L. c. 164, § 134(a). For the same reasons, the Department concludes that the Compact has satisfied these statutory requirements in its current Plan.

B. Statutory Non-Price Requirements

General Laws c. 164, § 134(a) requires that a municipal aggregation plan provide for universal access, reliability, and equitable treatment of all classes of customers. In D.T.E. 00-47, at 24, the Department concluded that the 2000 Plan satisfactorily provided for universal access because participation in the plan was available to all standard offer service and default service consumers. In the instant proceeding, participation in the 2004 Aggregation Plan also is available to all standard offer service and default service consumers within the Compact's member municipalities (Filing at ¶ 17). Accordingly, the Department concludes that the Compact has satisfied the statutory requirement of G.L. c. 164, § 134(a) regarding universal access.

In D.T.E. 00-47, at 24-25, the Department concluded that the 2000 Plan satisfactorily provided for reliability because the 2000 Plan ESA (1) called for all-requirements power supply, and (2) included sufficient financial assurance provisions. In the instant proceeding, the ESAs also call for all-requirements power supply and include financial assurance provisions that exceed those included in the 2000 ESA (*id.* at ¶ 24). Accordingly, the

Department concludes that the Compact has satisfied the statutory requirement regarding reliability.

Finally, in D.T.E. 00-47, at 25, the Department concluded that the 2000 Plan satisfactorily provided for equitable treatment of all classes of customers because it called for a reasonable phase-in of participation by customer class. In the instant proceeding, all standard offer service customers will be able to participate in the 2004 Aggregation Plan upon the Plan's commencement (Exh. DTE-1-6(b)). Similarly, all default service customers will be able to participate in the 2004 Aggregation Plan upon the expiration of the current Pilot Program on December 31, 2004 (*id.*). Accordingly, the Department concludes that the Compact has satisfied the statutory requirement regarding equitable treatment of all classes of customers.

C. Department Regulatory Requirements

General Laws c. 164, § 134(a) requires that a municipal aggregation plan meet any requirements established by law or the Department concerning aggregated service. In D.T.E. 00-47, at 27-28, the Department concluded that the Compact's proposed method of providing participating customers with information regarding the 2000 Plan's fuel sources, emissions characteristic and labor characteristics satisfied the Department's information disclosure requirements contained in 220 C.M.R. § 11.06. The methods by which the Compact will provide this information to customers under the current Plan remain unchanged from the methods approved by the Department in D.T.E. 00-47 (Exh. DTE-1-12). Accordingly, the Department concludes that the Compact has satisfied the applicable regulatory requirements regarding information disclosure.

In D.T.E. 00-47, at 28-29, the Department established the method by which existing and new customers would be enrolled in the 2000 Plan, consistent with Commonwealth's terms and conditions for competitive suppliers. The methods by which existing and new customers will be enrolled in the Plan remain unchanged from the methods approved by the Department in D.T.E. 00-47 (Exh. DTE-1-12). Accordingly, the Department concludes that the Compact has satisfied the regulatory requirement regarding the enrollment of customers.

D. Statutory Price Requirements

General Laws c. 164, § 134(a) is clear with regard to the price criterion that a municipal aggregator must satisfy through the end of the standard offer transition period. During this period, the Department may approve a municipal aggregation plan only if the plan's price is less than or equal to the applicable standard offer rate, unless the municipal aggregator can demonstrate that the price will be lower than standard offer service in subsequent years, or such excess price is due to the purchase of renewable energy.

G.L. c. 164, § 134(a). The Compact states that it will not execute an ESA with a supplier unless the supplier's price is lower than the standard offer service rate in Commonwealth's service territory through the end of the standard offer transition period (Filing at ¶ 23). The Compact requests that the Department approve the non-price terms included in the ESAs conditioned upon its covenant that will not execute an ESA unless the 2004 Aggregation Plan price is below Commonwealth's standard offer service rate (id. at ¶¶ 23, 32).

The Compact's request for pre-approval differs from the manner in which the Department currently reviews the results of distribution companies' competitive solicitations

for defaults service supply. In D.T.E. 99-60-C at 8-9, the Department established a five-business day review period for default service supply solicitations, finding that this period appropriately balanced the two competing objectives of (1) allowing the Department sufficient time to review the rates resulting from the solicitations to ensure that they are appropriately market-based and consistent with other reasonable measures of market activity,¹⁷ and (2) minimizing the time between when suppliers commit to their bid prices and when the prices take effect. If no action is taken by the Department within five business days, the proposed default service prices are allowed to go into effect. Id. at 8.

The Compact asserts that, in the competitive electric market, suppliers generally “hold” their prices for only a 24-hour period, and that requiring the potential suppliers to hold their bids for five business days to allow for Department review would result in the suppliers either not submitting bids or submitting bids that include what the Compact characterizes as “extremely high risk premiums” (Exh. DTE-1-1). The Department has recognized the importance of ensuring that our review process is appropriately responsive at to the workings of the wholesale market, stating that such responsiveness is essential to making markets work. D.T.E. 99-60-C at 8-9; Provision of Default Service, D.T.E. 02-40-C at 23-24 (2003).¹⁸

¹⁷ See also Letter to Massachusetts Electric Company Re: Default Service Solicitation - May 2003 through October 2003 (March 28, 2003).

¹⁸ Parties before the Department in other proceedings have argued that the “real time nature” of energy market pricing necessitates a 24-hour period for accepting or rejecting a price offer. See D.T.E. 02-40-C at 14-15.

The objective of the Department's review of municipal aggregation prices is straightforward and narrow -- to ensure that a plan is implemented only if its prices are below standard offer service prices. G.L. c. 164, § 134. With respect to the 2004 Aggregation Plan, two safeguards allow the Department to satisfy this objective without conducting a before-the-fact review of the Plan's prices. First, by requiring the Compact to submit a direct comparison of the prices included in the executed ESA and Commonwealth's standard offer service rate, the Department will be able to readily confirm that the Compact has satisfied its covenant regarding pricing -- the Plan prices either will or will not be less than standard offer service rate, with no need for subjective evaluation. Second, in the event that the Compact does not satisfy its covenant, the Department will be able to take action to ensure that the Compact and its supplier do not initiate services under the Plan.¹⁹ This action is analogous to the Department's ability to revoke the license of a competitive supplier in the case of "egregious misconduct." See 220 C.M.R. § 11.07(4)(c). As a result, the Compact, and not customers, will bear the risk that the Compact satisfies the covenant.

Having found that, with the future filing of executed supply agreements that do not (taken together with the administrative adder approved here) result in a price to customers that exceeds Commonwealth's standard offer service price, the Compact's Plan will have met all of the statutory requirements of G.L. c. 164, § 134(a), the Department today approves the non-price terms included in the ESAs. We do so upon the Compact's representation that it will not

¹⁹ The most readily-available action would be for the Department to direct Commonwealth not to provide the Compact and its supplier with the customer information necessary to complete the enrollment transactions submitted by the supplier.

execute any agreement unless the 2004 Aggregation Plan price is below Commonwealth's standard offer service rate.²⁰ To ensure that the Compact satisfies its covenant, the Department directs the Compact to submit a filing within five business days of executing the ESA that (1) confirms that the non-price provisions included in the ESA remain unchanged from the provisions included in the ESA submitted with the Compact's Filing, and (2) includes a direct comparison of the prices included in the executed ESA and Commonwealth's standard offer service rate.²¹

Because of the automatic enrollment/opt-out provision granted to municipal aggregators, the Department reviews municipal aggregation plans to ensure that the plans are designed and implemented in such a way that customers are appropriately protected. In the instant proceeding, the Department concludes that the provision in the 2004 Aggregation Plan that allows customers to exit the plan at any time without penalty provides one appropriate level of protection to plan participants.

Under the proposed Plan, the Compact expects to procure electric supply for its participants through at least September 2005 (Exh. DTE-1-8). General Laws c. 164, § 134, provides a benchmark for municipal aggregation plans during the standard-offer or transition

²⁰ The Plan price includes both the Compact's payments to the supplier and the reserve fund that the supplier collects from customers on behalf of the Compact. See Filing at Exh. B, ¶ 15.3.

²¹ Because the Compact has expended much effort to develop its municipal aggregation enterprise and because the Department sees value in these circumstances, as we near the end of the transition period, in not jeopardizing the Compact's future work, we flexibly construe § 134(a)'s initial filing requirements in these circumstances to effect Legislative intent to foster municipal aggregation.

period, but is silent as to any benchmark post-February 28, 2005. The Department does not now foresee, in view of the statute's silence, the need to impose any price benchmark for review of post transition municipal aggregation supply contracts undertaken pursuant to § 134(a). We need not now answer that question categorically, but can reserve the question for later review if events, in fact, warrant such review.

E. Education Plan

General Laws c. 164, § 134(a) requires that municipal aggregators inform electric consumers of their rights to opt-out of participation in an municipal aggregation plan and provide other pertinent information about the plan. The education plan component of the 2004 Aggregation Plan includes a general education component (through which the Compact will provide information to customers through the media, electronic communications, and public presentations) and a direct mail component that is targeted toward standard offer service customers. In D.T.E. 00-47, at 26, the Department concluded that the education plan component of the 2000 Plan (which also included general education and a direct mail component) satisfied this statutory requirement. The Department concludes that the education component of the 2004 Aggregation Plan will result in standard offer service customers being satisfactorily informed of their rights to opt-out of the Plan, as well as of other pertinent information about the Plan.

The education component of the Plan, however, does not specify what education and information efforts that will targeted towards Pilot Program participants during the period preceding their enrollment in the plan in January 2005. To ensure that Pilot Program

participants are satisfactorily informed about the 2004 Aggregation Plan, the Department directs the Compact to use the general education program that is included in Exhibit A of its Filing²² to inform and educate Pilot Program participants of their rights to opt-out of the Plan as well as other pertinent information about the Plan (including Commonwealth's default service rates for the first six months of 2005).²³ With the above condition, the Department concludes that the Compact has satisfied the statutory requirement regarding customer education and information.

F. Notification of Discontinuation of the 2004 Aggregation Plan

In its comments, Commonwealth identified concerns regarding the adverse effect that an unanticipated discontinuation of the 2004 Aggregation Plan could have on Commonwealth's default service customers (Commonwealth Comments at 1). To address these concerns, the Department directs the Compact to provide Commonwealth with (1) 90-day notice prior to a planned termination of the Plan, (2) 90-day notice prior to the end of the anticipated term of the Plan's supply contract, and (3) two-business-day notice in the event that the supplier will not cure a contract-related material default or where the Compact has reasonable grounds for insecurity with respect to performance by its contract supplier and the supplier has, despite the

²² The general education program consists of a public relations effort, advertising outreach, public presentations, and electronic information sources (Filing, Exh. A at 2-5).

²³ Commonwealth's default service rates change on January 1 and July 1 of every year. Its rates for the period January through June 2005 will become known on or around December 1, 2004.

Compact's request, failed to give adequate assurance of due performance. See e.g.

G.L. c. 106, § 2-609.

VII. ORDER

_____Accordingly, after due notice and consideration, the Department concludes that the 2004 Aggregation Plan satisfies the statutory and regulatory requirements regarding municipal aggregation, and approves the Plan, subject to the conditions established above, and it is

ORDERED: That the Cape Light Compact shall comply with all other directives contained in this Order.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Jr., Commissioner

/s/
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971.